

THE COMMONWEALTH OF MASSACHUSETTS



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September 27, 2021

By Electronic Mail

Barry P. Fogel, Esq.
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Re: *United States and Commonwealth of Massachusetts v. Lynn Water and Sewer
Commission ("Commission")*, Civil Action No. 76-2184-RGS

Dear Mr. Fogel:

We write to share our concerns regarding ongoing discharges that continue to plague water quality of King's Beach in Lynn, and Swampscott, resulting in persistent beach closures for a number of years. This summer was no exception, as water quality sampling showed elevated levels of *enterococci* at all three sampling locations along Kimball Road, Pierce Road, and Eastern Avenue resulting in the posting of warnings to the public not to swim in King's Beach on 51 out of 66 days between May 28 and August 31, 2021. The U.S. Environmental Protection Agency ("EPA") and Massachusetts Department of Environmental Protection ("MassDEP") identified Stacey Brook, a perennial stream that discharges onto King's Beach, as a significant source of bacteria and other pollutants, with forensic sampling, including the use of a select suite of pharmaceutical compounds, indicating the presence of human sanitary sewage at numerous locations in Stacey Brook discharge, including many unrelated to the CSO discharges. Residents continue to complain to EPA and MassDEP about the frequent beach closures, and media and Congressional interest remain high with respect to the ongoing sewage discharges onto the beach.

In September 2012, EPA and the Commission entered into Administrative Order on Consent, Docket No. 12-009 ("AOC"), to address, among other deficiencies, violations of the Commission's municipal separate storm sewer system ("MS4") permit. The AOC required the Commission to investigate and repair portions of its wastewater collection system and MS4 in the vicinity of the Stacey Brook watershed. On January 31, 2013, the Commission submitted an Illicit Discharge Detection and Elimination ("IDDE") Plan in this regard to EPA and MassDEP, which the agencies conditionally approved.

After continued Clean Water Act (“CWA”) violations, EPA entered into a Third Modified Consent Decree (“TMCD”) with the Commission in January 2017. The TMCD incorporated additional requirements to address CWA violations related to MS4, illicit discharge investigation, CSO reduction, and wastewater treatment plant operation. Among the requirements, Paragraph 17.e of the TMCD required that the Commission submit a Priority Ranking to EPA and MassDEP for work under its IDDE Plan. The Commission submitted its Priority ranking on June 30, 2017. On October 24, 2017, MassDEP sent a letter to the Commission commenting on the Priority Ranking (“October 24, 2017 MassDEP Comments”). The TMCD states in Paragraph 17.b.iv that the Commission shall “continue implementing the updated IDDE Plan with modifications resulting from the review and Approval process.” On November 9, 2017, the Commission provided a response to the October 24, 2017 MassDEP Comments, indicating how it would implement its IDDE Plan.

As part of the Priority Ranking, the Commission was required by Paragraph 17.e of the TMCD to “submit a schedule, in accordance with the priority ranking, for commencing and conducting the investigatory work to identify sources of illicit discharges in each Sub-catchment Area, broken down by calendar year.” The Commission was required by Paragraph 17.f to complete investigation of all sub-catchment areas in the Commission’s system, according to the Commission’s updated priority ranking order and schedule, *within three years of Lodging of the TMCD*, which would have been by January 19, 2020.¹ On page 12 of its Priority Ranking, the Commission indicated it would complete its investigations for Nahant Bay and Flax Pond from “Present-2018,” for Saugus River, Lynn Harbor and Sluice Pond from 2018-2019, for Floating Bridge Pond and Cedar Pond from 2019-2020.

Semi-Annual reports submitted to EPA and MassDEP under Section VII of the TMCD show that the Commission has failed to complete its investigation of all sub-catchment areas by January 19, 2020, in violation of paragraph 17.f of the TMCD. Unfortunately, it appears that after initial wet-weather and dry-weather sampling of MS4 and CSO outfalls, the Commission has done very little sub-catchment area investigations to identify and eliminate illicit sources from the City’s MS4. In fact, the semi-annual reports covering July 1, 2018, through December 31, 2020, indicate that *zero* sampling events were conducted to help determine whether there were any illicit connections in the area affected by Stacey Brook.²

To verify that illicit connections continue to be a source of pollutants, on June 16, 2021, EPA sampled the discharge from several stormwater outfalls located within the City’s MS4. On August 2, 2021, EPA sent the Commission its Reconnaissance and Sampling Inspection Report. A table included with the report showed elevated levels of ammonia, chlorine, and bacteria, in addition to the presence of personal care products at almost every outfall that was sampled.

¹ The TMCD was lodged on January 19, 2017.

² The Semi-Annual Report: IDDE Program (dated Jan. 25, 2019) states, “During the July 1, 2018- December 31, 2018 reporting period, LWSC conducted <10 inspections and/or investigations resulting in 0 sampling events as part of LWSC’s IDDE Program and Priority Ranking.” The following three semi-annual reports contain identical language. The most recent semi-annual report (dated July 25, 2021) indicated 10 sampling events were taken but did not result in the discovery of any illicit connections.

These factors demonstrate the continued contamination of stormwater from illicit sewer connections to the City's MS4.

Given the lack of progress in addressing illicit discharges to King's Beach, the Commission must undertake focused and aggressive actions for the Commission to begin to fulfill its obligations under its MS4 Permit and the TMCD, and to address the ongoing, troubling water quality issues at King's Beach. Accordingly, the Governments require the following:

- 1) On or before December 1, 2021, submit to EPA and MassDEP for review and approval a plan and schedule for illicit discharge detection and elimination for the Commission's storm drain discharges (Updated IDDE Plan). The Commission shall procure the services of an engineering firm to assist the Commission in developing and implementing the Updated IDDE Plan. The engineering firm shall have documented experience and expertise in undertaking such work.
- 2) The Updated IDDE Plan shall include, at a minimum, the following elements:
 - a. A summary of the Commission's work in implementing the 2013 IDDE Plan.
 - b. Based on the results of EPA's sampling data, Commission sampling data, and other information related to past IDDE efforts, provide a scope and schedule of actions to identify and remove illicit connections to the Commission's storm drain system. Such schedule shall prioritize actions necessary to address illicit connections discharging to King's Beach. Actions shall include regular sampling for illicit connections in the King's Beach watershed, to indicate the progress of the work, and further establish priorities for ensuing phases of work.
 - c. A storm drain map of the area. This map shall also be broken down into sub areas including junction nodes/structures used for sampling.
 - d. A plan to field verify the existing storm drain mapping.
 - e. Quality assurance and quality control procedures for the sampling program.
 - f. A description of the Commission's resource commitment to implementation of the Updated IDDE Plan, including allotment of Commission's staff time and resources, and an annual budget for carrying out the work.
- 3) Augment the monthly reporting currently proceeding to the MassDEP, EPA, the Department of Justice, and the Massachusetts Attorney General's Office on the Commission's actions to implement the Updated IDDE Plan, and the status of the work. Information shall include identification of the areas where the IDDE work was undertaken or completed, results of any sampling done, and any illicit connections found or removed.

Finally, this is a reminder that failure to comply with any of the remedial measures in Section VI ("Compliance") of the TMCD may result in a demand for stipulated penalties under Section IX of the TMCD. As described above, because the Commission has failed to complete investigation of all sub-catchment areas in the Commission's system, according to the

Commission's updated priority ranking order and schedule, within three years of Lodging of the TMCD, it is currently in violation of Paragraph 17.f of the TMCD. We urge the Commission to commit to addressing these deficiencies immediately, as outlined in this letter. As always, representatives from EPA and MassDEP are ready to meet and confer with Commission representatives to discuss the matters addressed herein.

Sincerely,

/s/ I. Andrew Goldberg

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